

No. A-760

75-1539

Supreme Court, U. S.

FILED

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In the Supreme Court of the United States

October Term 1975

**BOARD OF OPTOMETRY, STATE
OF CALIFORNIA,**

Appellant,

v.

**CALIFORNIA CITIZENS ACTION
GROUP, et al.,**

Appellees.

**On Appeal from the United States District Court
for the Central District of California**

JURISDICTIONAL STATEMENT

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BOARD OF OPTOMETRY, STATE OF CALIFORNIA,

Appellant,

v.

CALIFORNIA CITIZENS ACTION GROUP, et al.,

Appellees.

On Appeal From the United States District
Court for the Central District of California

JURISDICTIONAL STATEMENT

Appellant appeals from the Order Granting Preliminary Injunction entered by a three-judge District Court, Central District of California, on February 5, 1976. Said preliminary injunction enjoined the State of California from enforcing California Business and Professions Code sections 651.3, 2556 and 3129. Appellant submits this jurisdictional statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The 2-1 opinion of the three-judge District Court, Central District of California, is not yet reported and is set forth in Appendix A. The Order Granting Preliminary Injunction entered on February 5, 1976, is set forth in Appendix B.

JURISDICTION

This suit seeks to enjoin the State of California from enforcing state statutes alleged to be unconstitutional under the First Amendment. The Order Granting an Interlocutory Injunction was entered by the three-judge District Court on February 5, 1976. Appellant filed a notice of appeal with the clerk of the District Court on February 27, 1976. Jurisdiction to review the order rests with the United States Supreme Court pursuant to 28 U.S.C. section 1253.

STATUTES INVOLVED

The statutes and regulation challenged by appellees prohibit advertising the price of commodities furnished or services performed by licensed physicians and surgeons (ophthalmologists), optometrists and registered dispensing opticians. The challenged portions of the California Business and Professions Code provide:

"§ 651.3. No person, whether or not licensed under this division, shall advertise or cause or permit to be advertised, any representations in any form which in any manner, whether directly or indirectly, refer

to the cost, price, charge, or fee to be paid for any commodity or commodities furnished or any service or services performed by any person licensed as a physician and surgeon, optometrist . . . registered dispensing optician, when those commodities or services are furnished in connection with the professional practice or business for which he is licensed"

"§ 2556. It is unlawful to do any of the following: To advertise at a stipulated price or any variation of such a price or as being free, the furnishing of a lens, lenses, glasses or the frames and fittings thereof"

"§ 3129. It is unlawful to advertise at a stipulated price . . . any of the following:

" . . . the furnishing of a lens, lenses, glasses, or the frames or fittings thereof"

Title 16 of the California Administrative Code of the State of California provides in relevant part:

"Section 1515(b). No advertising of any optometrical service may state any stipulated amount of money or no money as a 'down payment' or any 'no charge for credit' or any stipulated amount of money as a periodical payment or at the termination of any period of time."

QUESTION PRESENTED

Did the three-judge District Court abuse its discretion when it issued a preliminary injunction prohibiting the State of California from enforcing statutes which prohibit commercial advertising of the price of prescription eyeglasses and contact lenses.

STATEMENT OF THE CASE

Appellant is the California State Board of Optometry (hereinafter referred to as the Board). It is required by law to protect the health and welfare of California citizens by enforcing statutes which regulate the practice of optometry in California. Appellees are the California Citizens Action Group, a California non-profit organization, and five California residents who use prescription eyeglasses.

Appellees brought this action in the United States District Court, Central District of California, Case No. CV 74-2079-FW, to enjoin appellant, the California Board of Medical Examiners, and the California Department of Consumer Affairs from enforcing several statutes and an administrative regulation governing the advertising of services and materials related to the furnishing of eye care. Appellees contended the statutes unconstitutionally infringed upon their claimed First Amendment rights to seek information. The statutes at issue are sections 651.3, 2556 and 3129 of the California Business and Professions Code and Title 16, section 1515(b) of the California Administrative Code. Appellees asserted jurisdiction pursuant to 28 U.S.C. sections 1331 and 1343(3).

Before the hearing on appellees' motion for a preliminary injunction, the District Court consolidated this action with Central District of California Case No. CV 74-2321 (AAH) FW (a similar action brought by Terminal-Hudson Electronics, Inc. of California, dba Opti-Cal, a registered dispensing optician), and ordered the convening of a District Court of three judges pursuant to 28 U.S.C. section 2281. On January 6, 1976, approximately nine months after the hearing on the motion for a preliminary injunction, the District Court issued a 2-1 decision stating that it would preliminarily enjoin the named defendants from enforcing the challenged statutes and regulation. The court also dismissed Case No. CV 74-2321 (AAH) FW on the grounds that a state suit involving the same parties and issues is currently pending in the state court. That dismissal is not before this Court. The Order for Preliminary Injunction was entered by the District Court on February 5, 1976. On February 27, 1976, appellant filed with the Clerk of the District Court a notice of appeal from the ordering granting a preliminary injunction.

On March 22, 1976, this Honorable United States Supreme Court granted appellant's application for a stay of the preliminary injunction.

THE QUESTIONS ARE SUBSTANTIAL

THE THREE-JUDGE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT ISSUED A PRELIMINARY INJUNCTION PROHIBITING THE STATE OF CALIFORNIA FROM ENFORCING STATUTES WHICH PROHIBIT COMMERCIAL ADVERTISING OF THE PRICE OF PRESCRIPTION EYEGLASSES AND CONTACT LENSES

- A. The United States Supreme Court Has Previously Upheld the Constitutionality of Statutes Prohibiting Price Advertising of Eyeglasses

In Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1954), the United States Supreme Court held that a state may constitutionally prohibit advertising of eyeglasses. The lower court had declared invalid that portion of an Oklahoma statute making it unlawful "to solicit the sale of frames, mountings or other optical appliances" on the grounds that the advertising of eyeglass frames "only casually related to the visual care of the public." The Supreme Court reversed and upheld the constitutionality of the Oklahoma statute, holding as follows:

"An eyeglass frame, considered in isolation, is only a piece of merchandise. But an eyeglass frame is not used in isolation, as Judge Murrah said in dissent below; it is used with lenses; and lenses, pertaining as they do to the human eye, enter the field of health. Therefore, the legislature might conclude that to

regulate one effectively it would have to regulate the other. Or it might conclude that both the sellers of frames and the sellers of lenses were in a business where advertising should be limited or even abolished in the public interest. Semler v. Oregon State Dental Examiners (US) supra. The advertiser of frames may be using his ads to bring in customers who will buy lenses. If the advertisement of lenses is to be abolished or controlled, the advertising of frames must come under the same restraints; or so the legislature might think. We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers." (Emphasis added.) 348 U.S. at 490.

In Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 (1963), the United States Supreme Court again upheld the constitutionality of statutes which prohibit "advertising by any means whatsoever the quotation of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings." Citing the Williamson case, the Court held as follows at page 428:

"Like the smoke abatement ordinance in the Huron case, the statute here involved is a measure directly addressed to protection of the public health, and the statute thus falls within the most traditional concept of what is compendiously known as the police power. The legitimacy of state legislation in this precise area has been expressly established."

The three-judge District Court ignored the decisions of the Supreme Court in Williamson and Head, supra, on the theory that the challenges in those cases "were based upon claims of a lack of due process and unequal treatment under the Fourteenth Amendment" and that First Amendment issues "were not invoked." Appellant contends that the lower court unduly restricted the meaning and effect of these Supreme Court cases. This is particularly true in the Williamson case where the United States Supreme Court did not limit itself to any one section of the Constitution when it said that there are "no constitutional" reasons why a state may not prohibit all who deal with the human eye from using merchandising methods for obtaining customers. Williamson v. Lee Optical of Oklahoma, supra, 348 U.S. 483, 490.

- B. The Three-Judge District Court Failed to Balance the Interests of the State in Protecting the Health of Its Citizens Against the First Amendment Interests at Stake, as Required by Bigelow v. Virginia, 421 U.S. 809 (1975)

In issuing its preliminary injunction, the lower court relied heavily upon Bigelow v. Virginia, 421 U.S. 809 (1975). Appellant contends that the lower court completely misread Bigelow and that the lower court's decision is actually contrary to the ruling of this Honorable Court in Bigelow.

In Bigelow, the managing editor of a newspaper was convicted of violating a Virginia statute prohibiting the sale or circulation of any publication encouraging or prompting the procuring of an abortion.

The editor had published a New York City organization's advertisement of low-cost abortion placements. The Virginia Supreme Court had rejected the editor's First Amendment defense on the theory that "commercial advertising" was not entitled to the free speech and press guarantees of the First Amendment. The United States Supreme Court reversed, holding that the Virginia court had erred in assuming that commercial advertising was entitled to no First Amendment protection. Bigelow v. Virginia, supra, 421 U.S. at 825.

The three-judge court in the instant case erroneously concluded that Bigelow automatically resolved all "commercial speech" and First Amendment issues in favor of appellees herein, and that a preliminary injunction should therefore issue against enforcement of the challenged California statutes. The lower court then proceeded to make the same mistake the Virginia Supreme Court made in Bigelow -- it failed to weigh the First Amendment interest at stake against the public interest served by the regulations. This Honorable Court stated in Bigelow that a court "may not escape the task" of balancing the interests at stake, and that said task "should have been undertaken by the Virginia courts before they reached their decision." Bigelow v. Virginia, supra, at 825-26.

In rejecting appellant's contention that price advertising of prescription eyeglasses constitutes unprotected "commercial speech," the lower court herein erroneously concluded that nothing further need be done. It failed, utterly and completely, to perform the balancing-the-interests test mandated by this Court in Bigelow. At the brief (approximately one-hour) hearing in this case, consisting of oral

argument, no testimony was permitted or taken. Several months later Bigelow was decided by this Court. Several months after Bigelow the lower court simply issued a preliminary injunction without engaging in any weighing or balancing tests required by this Court in Bigelow. The lower court erroneously concluded that it could "escape the task" of balancing the interests at stake, at least temporarily, by issuing a preliminary injunction against state enforcement of California statutes which have prohibited price advertising of prescription eyeglasses for over thirty years. Appellant submits that such action by the three-judge District Court constitutes a clear abuse of discretion. The order granting a preliminary injunction should be reversed.

C. Bigelow v. Virginia, Supra, Reaffirms that a State May Constitutionally Regulate Commercial Advertising of Prescription Eyeglasses Without Being in Violation of the First Amendment

The three-judge District Court further abused its discretion in issuing the preliminary injunction because it ignored that portion of Bigelow v. Virginia, supra, which expressly reaffirmed this Court's previous decisions upholding prohibitions against price advertising of eyeglasses. The lower court's opinion attempts to distinguish Williamson v. Lee Optical of Oklahoma and Head v. New Mexico Board of Examiners in Optometry, supra, on the grounds that those cases involved Fourteenth Amendment claims rather than First Amendment claims. The lower court then attempts to rely upon certain portions of Bigelow v. Virginia, supra, a First Amendment case,

choosing to ignore the express statement in Bigelow that the First Amendment does not invalidate this Court's previous decisions in Williamson and Head which uphold the constitutionality of eyeglass price advertising prohibitions. This Court stated in footnote 10 on page 825 of its opinion in Bigelow:

"Our decision also is in no way inconsistent with our holdings in the Fourteenth Amendment cases that concern the regulation of professional activity. See North Dakota Pharmacy Bd. v. Synder's Stores, 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973); Head v. New Mexico Board, 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); Barsky v. Board of Regents, 374 U.S. 442, 74 S.Ct. 650, 98 L.Ed. 829 (1954); Semler v. Dental Examiners, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086 (1935)."

Appellant contends that the lower court committed a clear abuse of discretion when it issued the preliminary injunction despite this Court's express reaffirmation of Williamson and Head in the Bigelow opinion.

D. A Preliminary Injunction Should Not Have Been Issued Against the State of California While Cases Presenting Similar Issues Have Been Argued and Are Pending in This Court

On November 11, 1975, this Honorable Supreme Court heard arguments in Virginia State Board of Pharmacy v. Virginia Citizens Consumer

Council, Inc., Case No. 74-895, probable jurisdiction noted U.S. ___, 95 S.Ct. 1389, 43 L.Ed.2d 650 (1975). On September 2, 1975, an appeal was filed in California State Board of Pharmacy v. Terry, 395 F.Supp. 94 (N.D. Calif. 1975), Case No. 75-336, 44 U.S.L.W. 3155. Both of these actions present the issue whether the First Amendment grants consumers a "right to know," thereby invalidating statutes prohibiting the commercial advertising of the price of prescription drugs. Thus, the issue presented is similar to the issue in the instant case. The District Court relied upon the Virginia case, supra, in issuing its preliminary injunction, even though this Court heard oral argument prior to the District Court decision and has not yet issued its decision therein.

If this Court reverses the Virginia case, the order granting a preliminary injunction in the instant case should obviously be reversed.

Even if this Court affirms the Virginia case, supra, in its pending decision, the instant case involves the providing of medical and health related services in conjunction with the dispensing of prescription eyeglasses and contact lenses -- services which may not necessarily accompany the furnishing of prepackaged prescription drugs. Price advertising of eyeglasses and contact lenses will result in deterioration of the quality of the medical and health related services provided by registered dispensing opticians, physicians and surgeons, and optometrists. Such a deterioration in the quality of services would cause serious physical damage to the public, as well as causing medical symptoms and defective vision resulting in serious physical injury to the patient or others. Significant and permanent damage to the eye may be caused by improper performance of these medical and health related services.

E. The Preliminary Injunction Upsets, Rather than Maintains, the Status Quo Pending Trial on the Merits

In opposing the issuance of a preliminary injunction below, appellant argued that such an injunction would upset the status quo, rather than maintain it, contrary to the general rule governing issuance of a preliminary injunction. King v. Saddleback Junior College District, 425 F.2d 426, 427 (9th Cir. 1970); Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472, 475-76 (9th Cir. 1969); Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804, 808-09 (9th Cir. 1963), cert. denied, 375 U.S. 821 (1963). Appellant's argument was premised upon the continuous existence of the challenged statutes since 1939, 1961 and 1973. Issuance of the preliminary injunction would upset the status quo, i.e., the longstanding existence of laws prohibiting price advertising of prescription eyeglasses, pending trial on the merits, rather than maintain the status quo pending trial.

The lower court concluded, however, that the status quo was not the existing statutory scheme but was in reality the "present day privileges and immunities under the First Amendment"; and that enforcement of the state statutes involved herein threatened the status quo of said "present day privileges and immunities." We are never told which specific "present day privileges and immunities" qualify to replace the longstanding California statutes as the "status quo," except for an oblique reference to the dilution of the commercial speech doctrine first enunciated in Valentine v. Chrestensen; 316 U.S. 52 (1942).

Appellant contends that there exists no judicial authority for such a strained definition of what constitutes the "status quo," for purposes of issuing or denying a preliminary injunction. The court clearly abused its discretion in connection with its resolution of the "status quo" issue.

F. The California Public Will Suffer Irreparable Harm if the Preliminary Injunction Is Affirmed and Allowed to Go Into Effect

The public will suffer irreparable injury if the preliminary injunction is affirmed and price advertising of eyeglasses and contact lenses is permitted pending trial on the merits. As physicians, optometrists and opticians cut corners in order to meet advertised "loss leaders" and "specials," valuable and necessary services will be abbreviated or eliminated in the dispensing of prescription eyeglasses and contact lenses. The result of this deterioration of quality will be serious harm to the eyes and to the health of the public, which can never be remedied by success at the trial on the merits. Denial of a permanent injunction at the conclusion of the trial on the merits will come too late for the victim of this harm if the order granting preliminary injunction is affirmed and allowed to go into effect.

Appellant has enforced the statutes at issue in this action for over thirty years. By reversing the preliminary injunction order, this Court will preserve the status quo pending trial on the merits. If the preliminary injunction is affirmed and allowed to go into effect, these statutes which have been relied upon as

a means of insuring quality control for ophthalmic goods and services, and for professional conduct, will be unenforceable by the State of California. The resulting chaos will damage the health and welfare of the citizens of California in an irreparable manner and will not be in the public interest.

The statutes at issue are an effective method of insuring professional conduct and the supply of quality ophthalmic materials. Without the mania of increased price competition through commercial price advertising, professionals have little incentive to resort to unscrupulous promotional methods to provide eyeglasses, contact lenses and accompanying dispensing services at a low price but even lower quality.

G. Reversal of the Order Granting a Preliminary Injunction Will Not Harm Appellees, Will Prevent a Multiplicity of Litigation and Will Serve the Public Interest

Under section 3131 of the California Business and Professions Code, private plaintiffs are empowered to bring actions to enforce section 3129 of said Code. Since the only defendants in this action are state agencies, private plaintiffs are still free to bring actions to enforce section 3129. Similarly, district attorneys are authorized to seek injunctions to enforce sections 3129, 2556 and 651.3 of the Business and Professions Code. See sections 3131, 2559 and 656 of the Business and Professions Code. Thus, appellees' goal of acquiring the information the dissemination of which is prohibited by the statutes

at issue can be prevented by private plaintiffs, and by district attorneys, even if this Court does not reverse the lower court. Under these circumstances, reversal of the District Court's order will not effectively impair the rights of appellees yet it will greatly aid the protection of the health and welfare of the people of California.

Furthermore, reversal of the lower court's order will prevent a multiplicity of litigation. Since section 3131 of the Business and Professions Code authorizes private plaintiffs to enforce Business and Professions Code section 3129, the California courts will be thrown into confusion as to whether they should follow the apparent decision of the District Court that the statutes are unconstitutional, or the state cases that uphold the constitutionality of the same statutes. Price advertising could therefore be legal in one area of the state and illegal in other areas. Expedited appeals in the state courts would then be necessary to resolve the conflict. This would impose a tremendous and unnecessary burden on the California courts -- a burden which will be avoided if this Court reverses the order granting a preliminary injunction.

For over thirty years the State of California has relied upon the statutes prohibiting price advertising of prescription eyeglasses and contact lenses as its tool to protect the health and welfare of Californians with respect to the provision of ophthalmic services and goods. The District Court has taken away this tool and left this health care area essentially without regulation. Only the stay order issued by this Court preserved the state's ability to so protect the health of its citizens. The threat of serious harm to the public clearly outweighs the minimal harm to the appellees,

who can be effectively prevented by private plaintiffs from obtaining much of the information they seek.

CONCLUSION

For all of the above reasons, appellant most respectfully invokes the jurisdiction of this Honorable Court.

Respectfully submitted,

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APPENDIX A

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CLERK, U.S. DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TERMINAL-HUDSON ELECTRONICS,
INC. OF CALIFORNIA, dba OPTI-CAL,)
Plaintiff,) DECISION
v.)
DEPARTMENT OF CONSUMER) No. CV 74-2321
AFFAIRS, et al.,) (AAH) FW
Defendants.) CONSOLIDATED
CALIFORNIA CITIZEN ACTION)
GROUP, et al.,)
Plaintiffs,) No. CV 74-2079
v.) ALS
DEPARTMENT OF CONSUMER)
AFFAIRS, et al.,)
Defendants.)

Before: ELY, Circuit Judge, EAST, Senior District Judge,
and WHELAN, District Judge*

EAST, Senior District Judge:

The above cases were consolidated as a matter of judicial expediency for hearing upon the several motions of the respective parties as hereinafter delineated.

*The above Case No. 74-2321 was upon the filing thereof assigned to the calendar of the Honorable A. Andrew Hauk, District Judge for this District, and thereafter transferred pursuant to the local rules of the district to the calendar of the Honorable Francis C. Whelan, District Judge above. (Cont.)

CASE NO. CV 74-2079 ALS

Plaintiffs' Cause:

IT APPEARS from the verified complaint:

The plaintiff California Citizen Action Group, (hereinafter referred to as CCAG) is a non-profit, non-partisan, volunteer organization incorporated in California, with a membership of approximately 800, many of whom are wearers of prescription eyeglasses;

The plaintiffs Dick Davis, Pedro Gonzales, Nathan Seiderman and Ernest A. Jacobi (hereinafter referred to as the Named Plaintiffs) are residents of the State of California and suffer certain optical infirmities which require that they wear prescriptive eyeglasses; and

The defendants are the Department of Consumer

Upon the written certificate of Judge Whelan, the Honorable Richard H. Chambers, Chief Judge for the Ninth Circuit, by written designation dated September 3, 1974, designated the Honorable Walter Ely, Circuit Judge for the Ninth Circuit, Senior District Judge William G. East for the District of Oregon, and the Honorable Francis C. Whelan, District Judge aforesaid, as constituting the above statutory three-judge District Court to hear Case No. 74-2321.

The above Case No. 74-2079 was upon the filing thereof assigned to the calendar of the Honorable Albert Lee Stephens,

Affairs, State Board of Optometry, and State Board of Medical Examiners, each statutory agencies of the State of California, and the respective individuals constituting the membership of the agencies, (hereinafter collectively and severally referred to as Defendants).

Jr., Chief Judge of this District. Upon the written certificate of Chief Judge Stephens dated November 5, 1974, and with the consent of all judges concerned, Chief Judge Chambers, by written designation dated on or about December 13, 1974, designated the above-named membership as constituting the statutory three-judge District Court to also hear the related Case No. 74-2321.

Chief Judge Chambers' designation last mentioned above and dated on or about December 13, 1974, provided, *inter alia*:

"Judge Whelan is designated as a member of the court for economy in judicial effort.

"Any party objecting to the membership of the court shall file an objection in the district court within 14 days from the date of the filing of this order in the district court."

No objection to that designation was at any time filed. Cf. *Hicks v. Miranda*, 43 U.S.L.W. 4857 (U.S. June 24, 1975) at 4858 n. 5, and at 4863 (Burger, C.J., concurring).

The Business and Professions Code of the State of California provides in relevant part:

Section 651.3: "No person, whether or not licensed under this Division, shall advertise or cause or permit to be advertised, any representations in any form which in any manner, whether directly or indirectly refer to the cost, price, charge, or fee to be paid for any commodity or commodities furnished or any service or services performed by any person licensed as a . . . optometrist . . . registered dispensing optician, when those commodities or services are furnished in connection with the . . . business for which he is licensed. . . ."

Section 2556: "It is unlawful to do any of the following: To advertise at a stipulated price or any variation of such a price or as being free, the furnishing of a lens, lenses, glasses or the frames and fittings thereof. . . ."

Section 3129: "It is unlawful to advertise at a stipulated price . . . any of the following: . . . the furnishing of a lens, lenses, glasses, or the frames or fittings thereof. . . ."

Title 16 of the Professional and Vocational Regulations of the State of California provides in relevant part:

Section 1515(b): "No advertising of any optometrical service may state any stipulated amount of money or no money as a 'down payment' or any 'no charge for credit' or any stipulated

amount of money as a periodical payment or at the termination of any period of time."

Provision is also made for possible criminal penalty for the violation of each of the sections.

It further appears from the verified complaint and the records herein that as a result of the proscriptions [sic] in the sections, there is in California no publication, advertising or promotion of the prices of prescription eyeglasses, and CCAG and the Named Plaintiffs are thereby deprived of true factual information concerning comparative pricing and where prescription eyeglasses might be purchased at such pricing.

CCAG and the Named Plaintiffs seek ultimate permanent relief by way of this court's declaration that the provisions of Sections 651.3, 2556 and 3129 of the Business and Professions Code of the State of California and Title 16, Section 1515(b), of the Professional and Vocational Regulations of the State of California, and each of them, to the extent that such provisions deprive them of news media public offerings of true factual information as to comparative costs and prices and where to purchase eyeglasses and kindred services at such costs and prices, are violative of their United States Constitution, First

Amendment, immunities and privileges, and, if necessary, permanent injunctive enforcement of the declaration.

Presently CCAG and the Named Plaintiffs seek temporary injunctive relief from the Defendants' enforcement of those provisions of the Sections asserted to the extent that such enforcement would deprive them of news media public offerings of true factual information concerning eyeglasses and kindred services as above delineated.

Motions:

We deny the Defendants' motion to dismiss the complaint and cause.

We reject the suggestion to abstain and defer to the State of California courts a state law interpretation of the sections involved. *See Procunier v. Martinez*, 416 U.S. 396, 404 (1974); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); and *Zwickler v. Koota*, 389 U.S. 241, 252-55 (1967).

The standing of CCAG as a proper party plaintiff is not established by undisputed evidence, and we reserve for a future determination, if required, the lawful standing of CCAG as a proper party plaintiff in these proceedings. Cf. *Construction*

Industry Association of Sonoma County v. Petaluma, No. 74-2100 (9th Cir. Aug. 13, 1975) at 6-9.

We grant the motion of the Named Plaintiffs for preliminary injunctive relief as sought.

Discussion:

The Defendants contend that news media paid informational advertisements of price structures for commodities and services at public offerings are "commercial" or "business" speech which enjoy no First Amendment protection under the rationale and rule of *Valentine v. Chrestensen*, 316 U.S. 52 (1942) [hereinafter cited as *Chrestensen*]. The rationale of *Chrestensen* has been criticized for nearly 20 years. Concurring in *Cammarano v. United States*, 358 U.S. 498 (1958), Mr. Justice Douglas wrote:

"*Chrestensen* . . . held that business advertisements and commercial matters did not enjoy the protection of the First Amendment . . . was casual, almost offhand. And it has not survived reflection. . . . Individual or group protests against action which results in monetary injuries are certainly not beyond the reach of the First Amendment. . . ." 358 U.S. at 513-14.

Informative is Mr. Justice Brennan's dissent in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 314, n. 6 (1974).

Lately, the *Chrestensen* rationale was sent to oblivion in *Bigelow v. Virginia*, 43 U.S.L.W. 4734 (U.S. June 16, 1975).^{1/} Therein the majority at 4737 say of the *Chrestensen* rationale of non-First Amendment protection "to paid commercial advertisements" that:

"Our cases, however, clearly establish that speech is not stripped of First Amendment protection merely because it appears in that form. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relation*, 413 U.S. 376, 384 (1973); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

"The fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees. The State was not free of constitutional restraint merely because the advertisement involved sales or 'solicitations,' *Murdock v. Pennsylvania*, 319 U.S. 105, 110-111 (1943) . . . or because appellant's motive or the motive of the advertiser may

1/ True enough, *Bigelow*, *supra* involved commercial advertising of an abortion referral service, while the issue before us is commercial advertising of eyeglasses. Both involve commercial advertising and we see no significant distinction between the two.

have involved financial gain, *Thomas v. Collins*, 323 U.S. 516, 531 (1945). The existence of 'commercial activity, in itself, is not justification for narrowing the protection of expression secured by the First Amendment.' *Ginzburg v. United States*, 383 U.S. 463, 474 (1966).

....

"The fact that [Chrestensen] had the effect of banning a particular handbill does not mean that *Chrestensen* is authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge. The case obviously does not support any sweeping proposition that advertising is unprotected *per se*."

Finally, the majority completely sweeps away and eradicates the *Chrestensen* rationale via the statement at p. 4739:

"The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.

"The Court has stated that 'a State cannot foreclose the exercise of constitutional rights by mere labels.' *NAACP v. Button*, 371 U.S., at 429. Regardless of the particular label asserted by the State--whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation'--a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation."

See Anderson, Clayton & Co. v. Washington State Department of Agriculture, ____ F. Supp. ____ (W.D. Wash. ____), 1975). See also *Population Services International v. Wilson*, 398 F. Supp. 321 (S.D. N.Y. 1975), appeal docketed sub. nom. *Carey v. Population Services International*, 44 U.S.L.W. 3162 (U.S. Sept. 30, 1975) (No. 75-443).

The Named Plaintiffs do not contend that they as a consenting audience are seeking to enforce a prospective advertiser's right to exercise his freedom of commercial speech but rather a correlative right to receive such informational advertisements. We are satisfied that the United States Supreme Court's case law recognition of an implied personal constitutional privilege and immunity to receive and have the fruit of free speech and press lawfully exercised under the First Amendment has now made the full circle.

Justice Brennan in his concurring opinion in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), wrote at 308:

"It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make

the express guarantees fully meaningful. [Citing cases] I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."

We conclude that the Named Plaintiffs' individual right to receive and have truthful information of comparative prices and where to buy corrective eyeglasses for the furtherance of his health and welfare is protected by the First Amendment as "'[i]t is now well established that the Constitution protects the right to receive information and ideas. "This freedom (of speech and press) . . . necessarily protects the right to receive. . . .' *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) . . . ; *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)." *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1971);^{2/} *Terry v. California State Board of Pharmacy*, 395 F. Supp. 94 (N.D. Cal. 1975); and *Virginia Citizens Consumer Council, Inc. v. State Board of Pharmacy*, 373 F. Supp. 683 (E.D. Va. 1974), *prob. juris. noted*, 43 U.S.L.W. 3499 (U.S. March 17, 1975) (No. 74-895).

^{2/} For an updated review of the development of the right to receive, see 63 Geo. L.J. 775, 777, *et seq.* (1975).

The Defendants rely upon the rationale of a valid and necessary police power protection of the health and welfare of a state's residents as expressed in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955), and *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963), to support the constitutionality of the challenged sections. That reliance is poorly placed. The statutory provisions under attack in those two cases were regulatory licensing measures placed on the artisans engaged in the prescribing, making, and dispensing of eyeglasses and forbidding any type of, *inter alia*, advertisement solicitation of business. Those challenges were based upon claims of a lack of due process and unequal treatment under the Fourteenth Amendment. Restrictions upon the freedom to speak and the correlative freedom to hear what is to be said under the First Amendment were not involved. See *Terry*, *supra* at 107-08.

Next, the Defendants recall to us that the challenged sections were enacted in 1973, 1939, and 1961; respectively, and have remained in effect ever since with obvious legislative approval. Therefore, they claim that the granting of preliminary relief to the Named Plaintiffs would run counter to and upset

the "status quo" rather than maintain the same as required by *Washington Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472 (9th Cir. 1969), and *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808-09 (9th Cir.), cert. denied, 375 U.S. 821 (1963).

Non-legislative corrective action is admitted; nevertheless it does not necessarily follow that the *status quo ante litem* of the judicial recognition and protection of the Named Plaintiffs' fundamental rights under the Privilege and Immunities Clause of the First Amendment have remained in the *status quo* since the enactment date of the sections until the present day. Witness the slow erosion and ultimate death knell of the *Chrestensen* rationale of non-First Amendment protection of commercial speech dealt by *Bigelow, supra* and forecast in *Terry, supra*.

Thus we conclude that the status quo of the Named Plaintiffs' present day privileges and immunities under the First Amendment is threatened by the continued enforcement of the challenged provisions of the sections pending final determination of these proceedings upon the merits.

The Defendants further insist that each of the factors that must be considered in weighing the application for a

preliminary injunction as required by *King v. Saddleback Junior College District*, 425 F.2d 426, 427 (9th Cir. 1970), weigh heavily against a grant of temporary relief herein. We believe to the contrary. Based upon *Terry, supra*, per District Judge Peckham, and *Virginia Citizens Consumer Council, supra*, we conclude that:

1. The Named Plaintiffs' First Amendment privileges and immunities are of primary and fundamental importance and they suffer and sustain day by day irrevocable injury as a matter of law through state law infringement and deprivation of those privileges and immunities; yet the issuance of temporary relief from the enforcement of the offending provisions of the challenged sections will not result in any recognizable hardship to the legitimate interests and purposes of the State of California which can be adequately served by immediate legislative enactment of less drastic means of lawful police power health and welfare regulation of the artisans engaged in the making and dispensing of prescription eyeglasses. Such is the mandate of the United States Supreme Court in *Kusper v. Pontikes*, 414 U.S. 51, at 58-59 (1973):

"For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. *Dunn v. Blumstein*, 405 U.S., at 343. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' *NAACP v. Button*, 371 U.S., at 438. If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties. *Shelton v. Tucker*, 364 U.S. 479, 488."

2. The public interest in the lawful dissemination of and the correlative interest in receiving true factual information concerning costs and prices and where to acquire corrective eyeglasses are equated, we believe, evenly with the highly measured public interest in the ultimate acquisition of pure foods,^{3/} prescription drugs,^{4/} abortions,^{5/} and contraceptives;^{6/} and

3. There is a great probability that at least the Named Plaintiffs will ultimately succeed in obtaining in these proceedings the ultimate declaratory judgment sought, and, if necessary,

^{3/} *Anderson, Clayton & Co., supra.*

^{4/} *Terry, supra*, and *Virginia Citizens Consumer Council, supra*.

^{5/} *Bigelow, supra*.

^{6/} *Population Services, supra*.

permanent injunctive enforcement thereof. *Terry, supra*, and *Virginia Citizens Consumer Council, supra*.

Finally, we conclude that the Named Plaintiffs are entitled to temporary injunctive relief enjoining the Defendants and all persons claiming by and through them from enforcing any of the provisions of the said sections inconsistent with the Named Plaintiffs' several First Amendment privileges and immunities as above delineated during the pendency of these proceedings or until further order of the court.

We deem that security in the sum of \$50 is sufficient security as required by Fed. R. Civ. P. 65(c).

The foregoing Decision constitutes this court's findings of fact and conclusions of law as provided by Fed. R. Civ. P. 52(a).

Counsel for the Named Plaintiffs is requested to prepare, serve opposing counsel, and present to this court within 15 days from the date hereof an appropriate order or orders based upon the findings of fact and conclusions of law above delineated for temporary injunctive relief consistent with the foregoing.

.....

CASE NO. CV 74-2321 (AAH) FW

This cause was instituted by the plaintiff Terminal-Hudson Electronics, Inc. of California, dba Opti-Cal, (hereinafter referred to as Opti-Cal) some three months after the institution of Case No. 2079 above. The defendants in the two proceedings are substantially common to each. Opti-Cal seeks identical temporary and permanent relief from state law infringement of First Amendment privileges and immunities.

Thereafter the Defendants, via the Board of Medical Examiners, State of California, and the Board of Optometry, State of California, as plaintiffs in the cause numbered C 98058 then pending in the Superior Court of the State of California, County of Los Angeles, obtained a preliminary injunction enjoining Opti-Cal during the pendency of the cause "from performing anywhere in the State of California, directly or indirectly," any or all of the acts of advertising as proscribed by the challenged sections.

Following the hearing of all counsel herein on April 25 last upon Opti-Cal's companion Fed. R. Civ. P. 65 motion for temporary injunctive relief, and the Defendants' motion to dismiss, it appeared that the State Court's preliminary injunction

was still in force and effect and in a continuing status. Nevertheless we indicated that the motion to dismiss should be denied and the plaintiffs' motion for temporary injunction was submitted.

Subsequent decisions of the Supreme Court of the United States in *Hicks v. Miranda*, 43 U.S.L.W. 4857 (U.S. June 24, 1975), and *Doran v. Salem Inn, Inc.*, 43 U.S.L.W. 5039 (U.S. June 30, 1975), cause us to *sua sponte* reconsider the Defendants' motion to dismiss.

For the reasons expressed above in Case No. 2079, we are convinced that Opti-Cal should be entitled to temporary and ultimate permanent relief correlative to that accruing to the Named Plaintiffs from the flagrant anti-competition inducing state law infringement of Opti-Cal's First Amendment privileges and immunities.

However, we are mandated to conclude that the complaint and cause of Opti-Cal must be dismissed in deference to the pending State proceedings as the appropriate forum for the presentation of Opti-Cal's First Amendment claims. *Hicks, supra*, and *Doran, supra*. We realize that the state proceeding against Opti-Cal is civil and injunctive in nature, but it is based

on statutes providing possible criminal penalty. Consequently, those proceedings are "akin to a criminal proceeding." See *Huffman v. Pursue*, 43 U.S.L.W. 4379 (U.S. March 18, 1975); cf. *Hicks*, *supra* at 4862 n. 20, and at 4864 (Brennan, J., dissenting).

Counsel for the Defendants is requested to prepare, serve opposing counsel, and present to this court within 15 days from the date hereof an appropriate order or orders for the dismissal of Case No. 74-2321 in accordance with the above.

DATED this 5th day of January, 1976.

/s/s
CIRCUIT JUDGE

/s/s
SENIOR DISTRICT JUDGE

DISTRICT JUDGE

WHELAN, District Judge

(Concurring in part and dissenting in part.)

I concur in the decision of the majority that Action No. ^{*} CV 74-2321 must be dismissed in deference to the pending State proceeding against Terminal Hudson Electronics, Inc. of California dba Opti-Cal.

However, I respectfully dissent from the holding of the majority in Action No. 74-2079. It would appear clear that under the rulings of the United States Supreme Court that the named Plaintiffs in the latter numbered action are not entitled to a preliminary injunction. The latest expression of the Supreme Court in *Bigelow v. Virginia*, 421 U.S. 809, speaking through Mr. Justice Blackmun, in fact states in footnote 10 on page 825 of the opinion:

"Our decision also is in no way inconsistent with our holdings in the Fourteenth Amendment cases that concern the regulation of professional activity. See *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156 (1973); *Head v. New Mexico Board*, 374 U.S. 424 (1963);

Williamson v. Lee Optical Co., 348 U.S. 483 (1955);
Barsky v. Board of Regents, 347 U.S. 422 (1954);
Semler v. Dental Examiners, 294 U.S. 608 (1935)."

What seems to be clear from a reading of *Bigelow and Pittsburg Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) is that purely commercial speech advertising purely commercial activity carried on within the state prohibiting such advertising is not protected by the First Amendment. In the instant case the advertising sought to be protected by the injunctive process is purely commercial in nature.

Thus it appears that there is no strong likelihood that such Plaintiffs are likely to prevail upon a full trial upon the merits. I would therefore deny the injunction sought.

DATED this 5 day of January, 1976.

Francis C. Whelan
FRANCIS C. WHELAN
UNITED STATES DISTRICT JUDGE

APPENDIX

B

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FILED
5:00 p.m.
FEB 4 1976
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

ENTERED
FEB 5 1976

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

Attorneys for: Dick Davis, Ernest A. Jacobi
Pedro Gonzales, Nathan Seiderman

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA CITIZEN ACTION GROUP, et al., Plaintiffs, vs. DEPARTMENT OF CONSUMER AFFAIRS, et al., Defendants.) No. CV 74-2079-FW) ORDER) FOR) PRELIMINARY) INJUNCTION

Before: ELY, Circuit Judge; EAST, Senior District Judge;
WHELAN, District Judge

Charles W. Anshen, Esquire, Lee Zorne, Esquire, Attorneys for Plaintiffs; Evelle J. Younger, Esquire, Attorney General of California, Alvin J. Korobkin, Esquire, (Deputy Attorney General, Attorneys for Defendants; William A. Gould, Jr., Esquire, (Wilke, Fleury, Sapunor & Hoffelt), Olsen and Sorrentino, Donald Maffley, Esquire, (Athearn, Chandler & Hoffman), James Reed, Esquire, Attorneys for Amici Curiae.

ORDER FOR PRELIMINARY INJUNCTION

For the reasons stated in the written opinion of the Court filed January 6, 1976, it is adjudged, ordered and decreed as follows:

That the defendants in this action, and each of them, their officers, agents, servants, employees and attorneys, as well as their successors in office; be and they are preliminarily enjoined and restrained from enforcing those portions of Sections 651.3, 2556 and 3129 of the Business and Professions Code of the State of California which prohibit the advertising of the price of eyeglasses, pending final determination of these proceedings on the merits or until further order of this Court.

Defendants are further ordered to post security in the sum of \$50.00.

Dated: February 3, 1976

/s/s

UNITED STATES CIRCUIT JUDGE

/s/s

SENIOR UNITED STATES DISTRICT JUDGE

Supreme Court, U. S.

FILED

MAY 14 1976

IN THE MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1539

BOARD OF OPTOMETRY,
STATE OF CALIFORNIA,

Appellant,

vs.

CALIFORNIA CITIZENS ACTION
GROUP, et al.,

Appellees.

MOTION TO AFFIRM

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 75-1539

BOARD OF OPTOMETRY,
STATE OF CALIFORNIA,

Appellant,

vs.

CALIFORNIA CITIZENS ACTION
GROUP, et al.,

Appellees.

MOTION TO AFFIRM

STATEMENT OF THE CASE

Appellees are the California Citizens Action Group, a non-profit organization and four California residents who use prescription eyeglasses. Appellant is the California State Board of Optometry, which regulates the practice of Optometry in California.

Appellees brought this action in the United States District Court, Central District of California, Case No. CV 74-2079 FW to enjoin appellant Board of Optometry the California Board of Medical Examiners, and the Department of Consumer Affairs from enforcing certain statutes and administrative regulations which prohibit the advertising of the price of eyeglasses. Appellees contended that §§ 651.3, 2556 and 3129 of the California Business and Professions Code and Title 16, § 151(6) of the California Administrative Code violate their first amendment rights to receive valuable information concerning the price of eyeglasses.

Before the hearing on appellees' motion for a preliminary injunction, the District Court consolidated this action with Central District of California Case No. CV 74-2321 (AAH) FW (a similar action brought by Terminal-Hudson Electronics, Inc. of California, dba Opti-Cal, a registered dispensing optician), and ordered the convening of a District Court of three judges pursuant to 28 U.S.C. § 2281. On January 6, 1976, approximately nine

months after the hearing on the motion for a preliminary injunction, the District Court issued a 2-1 decision stating that it would preliminarily enjoin the named defendants from enforcing the challenged statutes and regulation. The court also dismissed Case No. CV 74-2321 (AAH) FW on the grounds that a state suit involving the same parties and issues is currently pending in the state court. That dismissal is not before this Court. The Order for Preliminary Injunction was entered by the District Court on February 5, 1976. On February 27, 1976, appellant filed with the Clerk of the District Court a notice of appeal from the order granting a preliminary injunction.

On March 22, 1976, this Honorable United States Supreme Court granted appellant's application for a stay of the preliminary injunction.

ISSUE ON APPEAL

THERE IS ONLY ONE ISSUE ON THIS APPEAL; WHETHER THE THREE JUDGE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT ISSUED A PRELIMINARY INJUNCTION PROHIBITING THE STATE OF CALIFORNIA FROM ENFORCING STATUTES WHICH PROHIBIT THE DISSEMINATION OF THE PRICE OF EYEGLASSES AND CONTACT LENSES. APPELLEES SUBMIT THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION

- A. The United States Supreme Court Has NOT Previously Upheld the Constitutionality of Statute Prohibiting Price Advertising of Eyeglasses When Challenged on First Amendment Grounds
-

Appellant cites Williamson v. Lee Optical and Head v. New Mexico as cases wherein this Honorable Court has upheld the constitutionality of statutes prohibiting price advertising of eyeglasses. This statement is vague. In those 2 cases the United States Supreme Court held that laws prohibiting price advertising of eyeglasses did not violate the Fourteenth Amendment of the United States

Constitution.

Appellant relies heavily on a statement made by the court in Williamson stating

"We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers."

The court in Williamson "saw no constitutional reason" because the conduct of the state was not challenged on first amendment grounds. It is well settled law that only questions presented are decided. The Amicus Curiae in support of Appellant in the instant case was kind enough to point this out to this Honorable Court. On page 5 of the Amicus brief, first full paragraph last 4 lines he states:

"A contention that there was an invalid restraint on freedom of speech protected by the Fourteenth Amendment was not expressly

considered because it had not been properly presented."

The amicus cites Head v. New Mexico, 374 U.S. 432 note 12. Appellees agree entirely with this premise and submit that neither Williamson v. Lee Optical nor Head v. New Mexico considered first amendment challenges and therefore are not on point.

A second reason why the United States Supreme Court in 1954 may have made such a statement, and why the First Amendment was not presented was that at this time Valentine v. Christensen, 316 U.S. 52 (1941), holding that "advertising did not warrant first amendment protection" may still have been good law. Since the Williamson case in 1954, later cases concerning advertising and the First Amendment have held that advertising may warrant First Amendment protection.

Pittsburg Press Co. v. Pittsburg Commission on Human Rights, 413 U.S. 376 (1972);
United States v. Pellegrino, 467 F.2d 4 (9th Cir. 1972);

Hutt v. United States, 415 F.2d 664 (5th Cir. 1969), cert. denied, 397 U.S. 936 (1970).

If these cases had been law at the time Williamson v. Lee Optical was decided, the Supreme Court might not have made such a statement.

The fact that Williamson v. Lee Optical and Head v. New Mexico were decided on Fourteenth Amendment grounds and not on First Amendment grounds is of great importance. First Amendment rights have long been recognized to occupy a "preferred position" in the hierarchy of constitutional freedom. Saia v. New York, 334 U.S. 105. To implement this "preferred position" this Honorable Court has established different tests to uphold statutes challenged on First Amendment grounds rather than Fourteenth Amendment grounds. Under Fourteenth Amendment grounds a statute is required merely to have a rational basis. Nebbia v. New York, 291 U.S. 502; Olsen v. Nebraska, 313 U.S. 236; Williamson v. Lee Optical, 348 U.S. 483. But when a statute is challenged on First Amendment grounds, a state must show a

compelling state interest and the lack of a less drastic means in order to accomplish their objectives. Broadrick v. Oklahoma, 413 U.S. 601 (1973); Shelton v. Tucker, 354 U.S. 479 (1960).

B. Appellant's Assertion That the Three-Judge District Court Failed to Balance Interests on the State is Invalid

The three-judge court specifically confronted appellant's contention that there should be a weighing of the factors. The court weighed the factors on p. A 14 (bottom) of its opinion.

The court stated:

"The defendants further insist that each of the factors that must be considered in weighing the application for a preliminary injunction as required by King v. Saddleback Junior College District, 425 F.2d 426, 427 (9th Cir. 1970), weigh heavily against a grant of temporary relief herein. We believe to the contrary."

The court based its conclusion that the interests were balanced against the state and that temporary relief should issue on the reasonableness of Terry and the Virginia Citizens Consumer Council case cited in its opinion. The three-judge panel further gave 3 reasons for its conclusion:

1. That plaintiff's First Amendment rights suffer and sustain injury day by day. Citing Kusper v. Pontikes, 414 U.S. 51.

2. The court reasoned that the right to receive factual information concerning costs of eyeglasses were as much in the public interest as drugs, etc., decided in the Terry case, etc.

3. That there is great probability that plaintiffs will succeed.

These reasons are set out on pages A 15-A 17 of the three-judge opinion.

The court compared these to the state's interest. On page A is No. 1. The court stated,

"Yet the issuance of temporary relief from the enforcement of

the offending provisions of the challenged sections will not result in any recognizable hardship to the legitimate interests and purposes of the State of California which can adequately be served by immediate enactment of less drastic means of lawful police power health and welfare regulation of the artisans engaged in the making and dispensing of prescription eyeglasses."

This language shows conclusively that the court did balance the interests and found that the interests favored temporary relief. The court supports its reasoning with good authority. Therefore whether this Honorable Court agrees with the three-judge panel as to how the interests are balanced, the court was well within its discretion in granting temporary relief to the appellees.

C. Appellant's Assertion That Bigelow v. Virginia Reaffirms That a State May Constitutionally Regulate Commercial Advertising of Prescription Eyeglasses is True, But is Irrelevant to This Cause of Action

Appellee has never contended that advertising could not be regulated. Appellee contends that price advertising deserves First Amendment protection and cannot be prohibited without a compelling state interest, which outweighs the public interest. Bigelow reaffirmed Williamson and Head in relation to the Fourteenth Amendment, which requires only a rational basis to uphold. However, in reference to the First Amendment, under which this action is brought, Bigelow stated:

"The existence of commercial activity, in itself, is not justification for narrowing the protection of expression secured by the First Amendment. Ginzburg v. United States, 383 U.S. 463, 474 (1966)."

"A court may not escape the task of assessing the first amendment interest at state and weighing it against the public interest allegedly served by the regulation."

Bigelow did not overrule Williamson and Head but it distinguished them basing the differences between the tests required to uphold statutes challenged on First Amendment grounds as opposed to Fourteenth Amendment grounds.

D. Appellant Contends That the Three-Judge Panel Should Not Issue a Preliminary Injunction While Cases Presenting Similar Issues Have Been Argued and Are Pending Before This Court, However Appellant Fails to Cite Any Case Law to Support This Contention

The theory that appellant espouses, concerning refraining from deciding similar issues before the Supreme Court, is more a matter of discretion than mandatory.

However, aside from this fact, there

are other factors which the three-judge court had to consider in deciding whether to grant relief. The court had to consider that First Amendment rights were being chilled day by day which is grounds for temporary injunctive relief, Dombrowski v. Phitser, 380 U.S. 479 (1965) and the possibility of distinctions between the issues in the instant case as opposed to the drug cases.

Further the three-judge panel had ample authority based upon U.S. Supreme Court decision without considering the Terry and Virginia Drug cases. The court could have properly granted relief based upon Bigelow v. Virginia, 43 U.S. L.W. 473 4 (U.S. June 16, 1975), Lamont v. Post Master General, 381 U.S. 301 (1965) and other cases cited in their opinion.

E. Whether This Injunction Upsets the States Quo or Not is a Question of Fact, and Only One of the Factors to be Taken Into Consideration in Determining Whether Temporary Injunctive Relief Should be Granted

The three-judge panel addressed the status quo question on p. A 14 of its opinion. They concluded that commercial advertising deserved First Amendment consideration. The court in Wood v. State, 76 Oklahoma CA 89 said,

"Until it is proven that this statute is Constitutional, these rights (First Amendment), are not to be denied."

Zwicketer v. Koota, 389 U.S. 24 held that "... any delay in not granting the injunctive relief prayed might in itself effect the impossible chilling of the very constitutional right he seeks to protect."

F. The Fact That the People of California Will Have "Extra Dollars" is Not Irreparable Harm if This Injunction is Allowed to Stand

Appellant has a wild imagination to predict that in the short period of time it will take to decide this case that physicians, optometrists and opticians will all have to cut corners in order to meet advertising. It costs just as much to produce a defective eyeglass as to produce a correct eyeglass. Does the appellant really believe that a special production line will be set up to produce defective eyeglasses? How do we know that expensive eyeglasses are better or even different than cheap eyeglasses? I submit that prohibiting advertisement provides no safeguards. The legislature is free to enact any legislation governing the quality of eyeglasses, and presently has such statutes on the books. Surely this is an adequate safeguard to protect the public from the speculative resulting "chaos" predicted by appellant. Maybe allowing price advertising pending hearing by this Honorable Court will provide an opportunity to see

just what effect price advertising has on the California Health and Welfare! I submit that it will have none.

G. A Reversal of the Order Granting a Preliminary Injunction Will Harm Appellees

Appellees First Amendment rights are being harmed and appellees themselves are in danger of harm each day that they have to drive down the street without glasses because they cannot afford them. If this Honorable Court sustains this injunction and that results in expedited appeals in state courts as appellant contends then that is another reason why this injunction should be sustained because members of the public of the state of California not in only the Central District of California need their First Amendment rights protected.

If what appellant says concerning the right of private plaintiffs to enforce § 3129 of the Business and Professions Code is true then one would think if any harm is done to the public that private plaintiffs will seek to

have the prohibition of price advertising enforced through § 3129.

CONCLUSION

"Abuse of discretion" exists when it plainly appears that the action of the trial court effects an injustice, Hale v. Hale, 6 Cal.App.2d 611. These definitions make it clear that when the "abuse of discretion" test is used action taken by such court should not be overturned unless the court acted completely without reason. The well reasoned opinion of the three-judge panel is supported by ample authority and appellants have failed to allege any reason why the preliminary injunction should be overturned as an "abuse of discretion".

Appellee therefore prays that this Honorable Court uphold the preliminary injunction until a trial may be had on the merits.

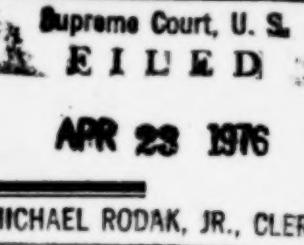
Appellee further prays that in addition asking that the injunction granted by the three-judge panel be upheld, that the injunction be modified to include

prohibiting the state court from interfering with the federal court's jurisdiction so that price advertising cannot be prohibited by private plaintiffs through § 3129 of the Business and Professions Code.

Respectfully submitted,

CHARLES W. ANSHEN

Attorney for Appellees



No. 75-1539

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

BOARD OF OPTOMETRY, STATE OF CALIFORNIA, *Appellant*
v.
CALIFORNIA CITIZENS ACTION GROUP, ET AL., *Appellees*

On Appeal from the United States District Court,
Central District of California

MOTION OF THE AMERICAN OPTOMETRIC
ASSOCIATION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE IN SUPPORT OF APPELLANT'S
JURISDICTIONAL STATEMENT, WITH BRIEF
ATTACHED

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On Appeal from the United States District Court,
Central District of California

**MOTION OF THE AMERICAN OPTOMETRIC
ASSOCIATION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE IN SUPPORT OF APPELLANT'S
JURISDICTIONAL STATEMENT**

The American Optometric Association hereby moves for leave to file the attached brief amicus curiae in support of appellant's jurisdictional statement. The basis for this motion is the following:

1. Appellant has given its written consent (which we have lodged with the Clerk) to the filing of such a brief. Appellees have withheld consent, thereby making this motion necessary.
2. The American Optometric Association, a non-profit membership organization incorporated under

the laws of the State of Ohio, is a national professional association of more than 19,000 members consisting of licensed Doctors of Optometry, optometry students, and educators. The objects of the Association, as set forth in its Constitution, "are to improve the vision care and health of the public and to promote the art and science of the profession of optometry."

3. A Doctor of Optometry is a primary provider of vital health care services who examines, diagnoses and treats conditions of the vision system. He is specifically educated, trained and licensed to examine the eyes and related structures to determine the presence of vision problems, eye disease or other abnormalities. Where appropriate, he prescribes and may dispense and adapt lenses or other optical aids and may use vision training or other methods of treatment to preserve or restore maximum efficiency of vision.

4. As the national professional organization representing the optometric profession, the Association has been, and is, vitally interested not only in legislation which seeks to improve the practice and standards of the profession itself, but also in legislation intended to assure to the public the availability of competent vision care and quality ophthalmic materials and to protect the public against deception and improper practices by any eye care provider. The Association also has been, and is, vitally interested, from a national perspective, in important litigation involving challenges to the validity of such legislation—particularly where, as here, validity is challenged on federal constitutional grounds and the implications of the case are national in scope.

5. The American Optometric Association, with the consent of the parties, participated as amicus curiae in

this Court in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955), filing a brief and arguing orally before the Court. And in *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963), the Association filed a brief amicus curiae, the Court having granted the Association's motion for leave to file such a brief.

For the foregoing reasons, the motion for leave to file the attached brief amicus curiae should be granted.

Respectfully submitted,

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April 1976

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BOARD OF OPTOMETRY, STATE OF CALIFORNIA, *Appellant*
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**On Appeal from the United States District Court,
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**BRIEF AMICUS CURIAE FOR AMERICAN
OPTOMETRIC ASSOCIATION, IN SUPPORT OF
APPELLANT'S JURISDICTIONAL STATEMENT**

**THE INTEREST OF THE AMERICAN OPTOMETRIC
ASSOCIATION**

The interest of the American Optometric Association is set forth in the Association's motion for leave to file this brief amicus curiae in support of appellant's jurisdictional statement.

ARGUMENT

The preliminary injunction granted by the 2-to-1 vote of the district court, totally enjoining the California State authorities from enforcing those portions of California's statutes which prohibit advertising the

price of eyeglasses, constituted a gross abuse of discretion. Indeed, the circumstances furnish a showing far more compelling than what will usually suffice, under this Court's Rule 15(g), for reversal of interlocutory injunctions improvidently granted.

The sensitive and important area of health care services—with all the attendant problems of assuring to the public competent professional services and of protecting the public against deception and improper practices—is an area which traditionally has been regulated by the States. Nevertheless, the district court majority here chose to enjoin a California statutory framework which has been in continuous operation for over thirty years. The district court majority did this abruptly and peremptorily—without taking evidence and without permitting the taking of evidence which was readily available and which would have shown the important reasons why the duly constituted California State authorities deemed the continuation of the long-standing California statutory framework to be essential to protecting the California public.

In addition, the district court majority granted this preliminary injunction—preventing the enforcement of legislation enacted by the representatives of all the people of California—solely at the behest of the four named individual plaintiffs. These four are California residents who (as the district court described them) “suffer certain optical infirmities which require that they wear prescriptive eyeglasses”. What, then, is the irreparable injury they might suffer if they were required to wait until the entry of final judgment one way or the other at the end of the litigation? It is perfectly evident that the only “hardship” even arguably present is that, meanwhile, they might have to

make a few local telephone calls in the event that, during such period, they really wanted a new eye examination to decide whether a new prescription was called for and really were interested in learning more about comparative prices for such services. In other words, the case is a classic illustration of no irreparable injury whatsoever to these plaintiffs.

Moreover, the district court majority entered its preliminary injunction despite prior decisions of this Court expressly sustaining the broad regulatory authority of the States in this very area. These decisions not only have not been overruled or qualified by this Court; they have recently been cited by this Court with approval and respect (see note 3, below).

From every one of these standpoints, the district court majority abused its discretion by granting the preliminary injunction. In the aggregate, it was an abuse rising to enormous dimensions. As a result, the appeal raises questions of far-reaching importance relating to the public health and welfare and to our system of federalism.

As we have said, this appeal directly involves the rights of the States to regulate the delivery of health care services and materials. It directly affects the public health and welfare. In the overwhelming majority of the States, price advertising of optometric services and materials is regulated by State statutes or by regulations adopted by State agencies. In many of those States there is a strong body of opinion that such advertising leads to results which are highly detrimental to the consuming public. As this Court has expressly recognized, such statutes were enacted to protect the public health and welfare. *Williamson v. Lee*

Optical of Oklahoma, 348 U.S. 483 (1955); *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963); *Wall v. Hardwick*, No. 74-194, 419 U.S. 888 (1974); see also *Semler v. Dental Examiners*, 294 U.S. 608 (1935).

Such state laws have been in existence for many years; they have been sustained not only by this Court in the decisions just cited, but also by numerous state courts.¹

In *Williamson* this Court sustained the constitutional validity of such a State statute as applied to the advertising of the sale of frames by opticians, holding that the statute did not violate the Due Process or Equal Protection Clauses of the Constitution. There the Court said (348 U.S. at 490): "An eyeglass frame, considered in isolation, is only a piece of merchandise. But an eyeglass frame is not used in isolation, as Judge Murrah said in his dissent below; it is used with lenses; and lenses, pertaining as they do to the human eye, enter the field of health. . . We see no constitutional reason why a State may not treat all who deal with the human

¹ *Louisiana State Board of Optometry Examiners v. Pearle Optical*, 248 La. 1062, 184 So. 2d 10 (1966); *Economy Optical Co. v. Kentucky Board of Optometric Examiners*, 310 S.W.2d 783 (Ky. 1958); *Ullom v. Boehm*, 392 Pa. 643, 142 A.2d 19 (1958); *Norwood v. Paranteau*, 75 S.D. 303, 63 N.W.2d 807 (1954); *Klein v. Department of Registration and Education*, 412 Ill. 75, 105 N.E.2d 758 (1952), certiorari denied, 344 U.S. 855 (1952); *Ritholtz v. Commonwealth*, 184 Va. 339, 35 S.E.2d 210 (1945); *Melton v. Carter*, 204 Ark. 595, 164 S.W.2d 453 (1942); *Commonwealth v. Ferris*, 305 Mass. 233, 25 N.E.2d 378 (1940); *Bennett v. Indiana State Board of Registration and Examination in Optometry*, 211 Ind. 678, 7 N.E.2d 977 (1937); *Seifert v. Buhl Optical Co.*, 276 Mich. 692, 268 N.W. 784 (1936); *Texas Optometry Board v. Lee Vision Center, Inc.*, 515 S.W.2d 380 (Tex.Ct.of App. 1974).

eye as members of a profession who should use no merchandising methods for obtaining customers."

In *Head*, this Court upheld New Mexico's statutory prohibition against price advertising of eyeglasses. In ruling that this did not violate the Due Process or Commerce Clauses of the Constitution, the Court said (374 U.S. at 428-429): "the statute here involved is a measure directly addressed to protection of the public health, and the statute thus falls within the most traditional concept of what is compendiously known as the police power. The legitimacy of state legislation in this precise area has been expressly established. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483." The Court also held that the statute did not violate the privileges and immunities of national citizenship, and that it was not preempted by the Federal Communications Act, stating that "we cannot believe Congress has ousted the States from an area of such fundamentally local concern" (374 U.S. at 432). A contention that there was an invalid restraint on freedom of speech protected by the Fourteenth Amendment was not expressly considered because it had not been properly presented (374 U.S. at 432 note 12).

Thus the prior decisions of this Court involving optometry statutes have upheld their constitutional validity. As *Head* recognized (374 U.S. at 426), the purpose of such legislation has been to "protect . . . citizens against the evils of price advertising methods tending to satisfy the needs of their pocketbooks rather than the remedial requirements of their eyes". But here the district court majority rode roughshod over these established principles of law by indulging in a speculative—and, we submit, almost certainly incorrect—prognosis concerning what will be the ultimate reach of develop-

ments giving a degree of First Amendment protection to certain aspects of what currently is sometimes referred to as "commercial speech".³

In issuing a preliminary injunction based somewhat mysteriously on such extreme speculation, the district court majority relied on this Court's decision only last term in *Bigelow v. Virginia*, 421 U.S. 809 (1975). Yet the district court majority totally overlooked the fact that in that very *Bigelow* decision this Court said (421 U.S. at 825 note 10):

We have no occasion, therefore, to comment on decisions of lower courts concerning regulation of advertising in readily distinguishable fact situations. . . . In those cases there usually existed a clear relationship between the advertising in question and an activity that the government was legitimately regulating. . . .

³ The fact that, in a wide variety of contexts, the First Amendment does not immunize "commercial speech" against legitimate Governmental regulation or prohibition is established by a long line of decisions of this Court, including some of very recent vintage. See, for example, *Associated Press v. United States*, 326 U.S. 1 (1945) (antitrust violations); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (same); *Donaldson v. Read Magazine*, 333 U.S. 178, 192 (1948) (prohibition against using mails for fraudulent advertising); *Pittsburgh Press v. Human Relations Commission*, 413 U.S. 376 (1973) (unlawful help-wanted advertisements based on sex discrimination); *United States v. Reidel*, 402 U.S. 351 (1971) (prohibition against business of selling obscene materials through the mails); *California v. LaRue*, 409 U.S. 109 (1972) (prohibition against certain types of entertainment in places where liquor is sold); *N.L.R.B. v. Virginia Electric & P. Co.*, 314 U.S. 469 (1941) (coercive management speeches are unfair labor practice); *Capital Broadcasting Company v. Mitchell*, 333 F.Supp. 582 (D.D.C., 1971), affirmed sub nom. *Capital Broadcasting Company v. Acting Attorney General and National Association of Broadcasters v. Acting Attorney General*, 405 U.S. 1000 (1971) (prohibition of cigarette advertising on radio and television).

Our decision also is in no way inconsistent with our holdings in the Fourteenth Amendment cases that concern the regulation of professional activity. See *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156 (1973); *Head v. New Mexico Board*, 374 U.S. 424 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Barsky v. Board of Regents*, 347 U.S. 442 (1954); *Semler v. Dental Examiners*, 294 U.S. 608 (1935).⁴

A word should be added concerning the pending cases involving State laws restricting the advertising of prescription drugs. The district court majority referred to the Virginia case, *Virginia Citizens Consumer Council, Inc. v. State Board of Pharmacy*, No. 74-895, in which this Court had then noted probable jurisdiction; the case has subsequently been argued and, as this brief is written, is awaiting decision by this Court. It referred also to a comparable California case, *Terry v. California State Board of Pharmacy*, 395 F. Supp. 94 (N.D. Cal. 1975), now pending on appeal in this Court on a jurisdictional statement, No. 75-336 and presumably being held to await the Virginia decision. But however the prescription drug matter is decided, it is evident that reversal of the present case is called for. If the Virginia prohibition against advertising the price of prescription drugs is sustained, then it would clearly follow, *a fortiori*, that the California statute prohibiting advertising the price of eyeglasses must be upheld. But even if in the Virginia case the prohibition

⁴ In addition to these references in the *Bigelow* opinion, it should be noted that this Court has also referred to *Williamson* and *Head* with approval in other recent decisions such as *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156, 167 (1973); *California v. LaRue*, 409 U.S. 109, 116 (1972); *Geduldig v. Aiello*, 417 U.S. 484, 495 (1974); *Miller v. California*, 413 U.S. 15, 32 note 13 (1973); *Kelley v. Johnson*, No. 74-1269, decided April 5, 1976.

against advertising the price of prescription drugs were to be stricken down, the differences between that situation and the vision-care situation are sufficiently far-reaching and substantial so that the California statutes involved in this case should be sustained. Long history and experience have established that the furnishing of prescription eyeglasses—which are custom-tailored to the vision needs of the particular individual—is in the context of rendering individualized health services furnished by eye-care providers. Those activities are subject to extensive regulation by the State in order to protect the public interest. Unless the essence of this Court's prior decisions is to be totally ignored, it follows that in those jurisdictions where, as in California, a legislative judgment has been made that the public interest requires a prohibition on such advertising, the prohibition is a valid exercise of State power and, as such, does not intrude on the First Amendment as reasonably and sensibly construed.

CONCLUSION

For the foregoing reasons, in addition to those set forth in the appellant's jurisdictional statement, the judgment granting the preliminary injunction should be reversed.

Respectfully submitted,

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